



April 24, 2000

Mr. Dennis Duffy
General Counsel
University of Houston System
E. Cullen Building, Room 212
Houston, Texas 77204-2162

OR2000-1593

Dear Mr. Duffy:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 134417.

The General Counsel of the University of Houston and the University of Houston Police Department (collectively the “university”) received a request for a complete copy of the offense file in a specified criminal case. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially we note that the submitted records include at least one document filed with a court. Any such responsive information that also is contained in a public court record must be released. *See* Gov’t Code § 552.022(a)(17); *see also* *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). The submitted information also includes medical records whose disclosure is governed by the Medical Practice Act, subtitle B of title 3 of the Occupation Code. Section 159.002 of the Occupation Code provides in relevant part:

- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter ... may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occupation Code § 159.002(b), (c). The Medical Practice Act includes provisions that govern the disclosure of information that it encompasses. *See* Occupation Code §§ 159.003, 159.004, 159.005, 159.006. In construing the predecessor statute, this office held that in governing access to a specific subset of information, the Medical Practice Act prevails over the more general provisions of chapter 552 of the Government Code.¹ Therefore, the medical records contained in the submitted information may be released only in accordance with the Medical Practice Act.

As amended by the Seventy-sixth Legislature, section 552.103 of the Government Code, the “litigation exception,” provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documentation sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To sustain its burden, the governmental body must demonstrate: (1) that litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. -- Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. -- Houston [1st Dist.] 1984, writ ref’d n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.* The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a

¹*See* Open Records Decision No. 598 (1991). The Seventy-sixth Legislature repealed the predecessor statute in enacting the Occupation Code. The former article 4495b of Vernon’s Texas Civil Statutes now is codified as the Medical Practice Act at subtitle B of title 3 of the Occupation Code, and the former section 5.08 of article 4495b is codified as chapter 159 of the Occupation Code. As the enacting legislation was a non-substantive codification, interpretations of the predecessor statute retain their relevance. *See* Act of May 13, 1999, 76th Leg., R.S., ch. 388, §§ 6, 7, 1999 Tex. Gen. Laws 1431, 2439-40.

governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.*² This office has held that a governmental body’s receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If that representation is not made, the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

You have provided this office with a copy of a notice of claim under chapter 101 of the Civil Practice and Remedies Code for injuries allegedly inflicted on the requestor by an employee of the university. You explain that the information that you seek to withhold represents the outcome of investigations of the requestor’s claim and the alleged assault by your office and the university police department. Based on your representations and our review of the background materials that you submitted and the information that you seek to withhold, we conclude that the university has made the requisite showing that the requested information relates to anticipated litigation for the purposes of section 552.103 of the Government Code. We note, however, that section 552.103 does not permit the university to withhold basic front-page information contained in the police reports. *See* Open Records Decision Nos. 597 (1991) (holding that the basic information in an offense report that had been disclosed to the defendants in the related criminal case could not be withheld from the public under the statutory predecessor to section 552.103); 362 (1983) (holding that the names of the officers who executed a search warrant could not be withheld under the predecessor statute). The university must release the basic front-page offense and arrest report information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App. -- Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); *see also* Open Records Decision No. 127 at 3-4 (1976) (delineating information that must be disclosed under *Houston Chronicle*).

In concluding that the university may withhold information relating to the anticipated litigation under section 552.103, we assume that the requestor has not seen or had access to any of the information that you seek to withhold. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party to anticipated or pending litigation previously has seen or had access to requested information relating to the litigation,

²Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, you may not withhold the submitted correspondence between the requestor or her attorney and the university or any other responsive information that the requestor provided to the university. Furthermore, the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).³ The university must not release any confidential information, however, even at the conclusion of the related litigation. *See* Gov't Code §§ 552.101, .352.

In summary, the university must release any requested information that also is a matter of public court record, basic information relating to the investigation of the alleged assault by the university police department, and any responsive information related to the anticipated litigation that the requestor provided to the university. The release of responsive medical records is governed by the Medical Practice Act. Other responsive information to which the requestor has not had previous access is excepted from public disclosure pursuant to section 552.103 of the Government Code. As we are able to make a determination under section 552.103, we do not address your claims under sections 552.101 and 552.107. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839.

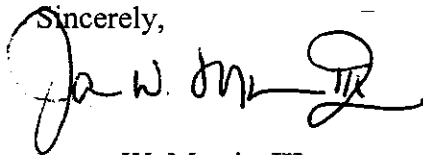
³In this regard, we note that the requestor submitted a letter to this office, dated March 1, 2000, in which she asserts that she is no longer represented by any legal counsel and that no pending litigation exists.

The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Ja W. Morris III", written over a horizontal line.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ljp

Ref: ID# 134417

Encl. Submitted documents

cc: Ms. Cynthia Underwood
8802 Ilona, No. 7
Houston, Texas 77025
(w/o enclosures)